

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 864

MERCHANTS NATIONAL BANK OF BOSTON, EXECUTOR,
PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIRST
CIRCUIT

MEMORANDUM FOR THE RESPONDENT

There are two related questions in this case:

(1) Whether a charitable bequest in remainder of the corpus of a testamentary trust is deductible for estate tax purposes under Section 303 (a) (3) of the Revenue Act of 1926, c. 27, 44 Stat. 9, where the trustee is empowered to invade the corpus for the "comfort, support, maintenance and/or happiness" of the life beneficiary, the testator's wife; and (2) whether, in these circumstances, a capital gain realized by the trust is deductible in computing its net income under Section 162 (a) of the Revenue Act of 1936, c. 690, 49

(1)

Stat. 1648, as income "which pursuant to the terms of the will * * * is * * * paid or permanently set aside" for charitable purposes.

The Circuit Court of Appeals held that since the requirements of the widow were unmeasurable and under the terms of the trust there was the possibility that the corpus would be invaded, the amounts going to charity were uncertain; accordingly, the deductions were disallowed for both estate tax and income tax purposes. The court, in accordance with its earlier decision in *Gammons v. Hassett*, 121 F. 2d 229, certiorari denied, 314 U. S. 673, considered irrelevant certain evidence as to the likelihood that the life tenant would want to invade the corpus. The Circuit Court of Appeals for the Ninth Circuit, however, basing its decision on *Ithaca Trust Co. v. United States*, 279 U. S. 151, has recently ruled that, although there is a power of invasion, the deduction is allowable if extrinsic facts show that the possibility is remote. *Commissioner v. Bank of America, Etc.*, 133 F. 2d 753 (C. C. A. 9). While the facts of the cases are different, the decisions are basically in conflict. Compare the decision of the Circuit Court of Appeals for the Tenth Circuit in *Commissioner v. F. G. Bonfils Trust*, 115 F. 2d 788.

We think the decision below is correct. It is in accord with Treasury Regulations of long

standing.¹ See Haney, C. J., dissenting in *Commissioner v. Bank of America, supra*. The contrary view represents an unnecessary and unsound extension of the *Ithaca Trust Co.* decision. In view of the *Bank of America* case, however, we do not oppose issuance of the writ here.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

APRIL 1943.

¹ Treasury Regulations 80, Article 47, provides:

"ART. 47: *Conditional bequests.*— * * *

"If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

The provisions of Treasury Regulations 63 (1922 ed.), Article 50; Treasury Regulations 68, Article 47; Treasury Regulations 70, Article 47; and Treasury Regulations 105, Section 81.46, are identical except that the first three begin with the word "where" instead of "if."